UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

SQUIRE CORRUGATED BOX COMPANY

and

Case 22-CA-104475

PRODUCTION WORKERS UNION, LOCAL 148

Joshua Mendelsohn, Esq., Newark, NJ for the General Counsel. John A. Craner, Esq., (Craner, Satkin, Scheer, Schwartz & Hanna PC) Scotch Plains, NJ for the Respondent. Michael T. Scaraggi, Esq., (Oransky, Scaraggi & Borg PC) West Caldwell, NJ for the Charging Party.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge: Pursuant to charges and amended charges filed by Production Workers Union, Local 148 (the Union or Charging Party), the Director for Region 22 of the NLRB issued a complaint and notice of hearing on July 30, 2013,¹ alleging that Squire Corrugated Box Company (Respondent) violated Section 8(a)(1) and (5) of the Act by failing and refusing to abide by the terms of the collective bargaining agreement between it and the Union, by failing to make payments to the Union pension fund and by failing to provide unit employees with severance pay and vacation time.

The trial with respect to allegations raised in the above complaint was held before me on November 14. Briefs have been filed by Respondent and General Counsel and have been carefully considered. Based upon the entire record, including my observations of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation with a place of business in South Plainfield, New Jersey, has been engaged in the business of manufacturing corrugated boxes. During the twelve months preceding July 30, Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000 and purchased and received at its South Plainfield, New Jersey facility, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New Jersey.

¹ All dates hereinafter referred to are in 2013, unless otherwise stated.

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

The Union and Respondent are parties to a collective bargaining agreement, which by its term runs from January 1, 2013 through December 31, 2015 and provides for recognition of the Union in a unit of production and maintenance employees and truck drivers, excluding clerical and office employees, guards, professional employees and supervisors.

The collective bargaining agreement requires Respondent to make regular pension contributions based on employees' hours worked, to make severance payments of two weeks' pay in the event of termination or liquidation of the business and to pay employees pro-rata vacation pay to employees laid off at the time of their job severance. The collective bargaining agreement also requires Respondent to make monthly payments to the Union's welfare fund on behalf of its employees. The contract also contains a grievance procedure, which is set forth below:

GRIEVANCE PROCEDURE:

Art. 14. A grievance is hereby jointly defined to be any controversy, complaint, misunderstanding, or dispute.

Any grievance arising between the Company and the UNION shall be settled in the following manner:

- a) The aggrieved employee or employees must present the grievance to the Shop Steward within twenty-four (24) hours after the reason for the grievance has occurred, except that no time limit shall apply in case of violation of wage provisions of this Agreement. If a satisfactory settlement is not effected with the foreman within three (3) working days, the Shop Steward and employee shall submit such grievance in writing to the Union's Business Representative.
- b) The Business Representative shall then take the matter up with a representative of the Company with authority to act upon such grievance. A decision must be made within five (5) working days.
- c) If the Company fails to comply with any settlement of the grievance or fails to comply with the procedures of this Article, the Union has the right to take all legal and economic action to enforce its demands.

45 SECTION 2.

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Any Shop Steward shall be permitted to leave his/her work to investigate and adjust the grievance of any employee within his jurisdiction, after notification to his Supervisor. Employees shall have the Shop Steward or a representative of the Union present during the discussion of any grievance with representatives of the Company.

SECTION 3.

a) The dispute shall then be submitted to an Arbitrator appointed by the New Jersey State Board of Mediation or American Arbitration Association.

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b) Expenses of the Arbitration selected or appointed shall be borne equally by the Company and the Union, unless Arbitration is requested because of the Employer's failure to make remittances as required by this Agreement, in which event the Employer shall pay the total cost.

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SECTION 4.

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a) The Arbitrator shall not have the authority to amend or modify this Agreement or establish new terms or conditions under this Agreement. The Arbitrator shall determine any question or arbitrability. In the event the position of the Union is sustained, the aggrieved party shall be entitled to all the benefits of this Agreement which would have accrued to his had there been no grievance.

SECTION 5.

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a) Both parties agree to accept the decision of the Arbitrator as final and binding. If the Company fails to comply with the award of the Arbitrator or with the procedures of this Article, the Union has a right to take all legal and economic action to enforce compliance.

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The agreement also provides for an expedited arbitration provision covering disputes concerning failure to make payments to the Union's welfare fund or to the pension fund, which allows arbitration to be scheduled on a 24-hour notice and permits the arbitrator to proceed without the company appearing, if necessary.

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In March, Charles Clemenza, then, the Union's vice-president, received calls from the Union's shop steward as well as from other employees, expressing concerns that something was going on and there was little work, and it looked as if the place was being showed for sale. Subsequently, Clemenza went to the shop to see for himself what was going on. Clemenza found out that Respondent was "winding down" and the men were standing around with no work to do.

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On a date in late March or early April, Clemenza received a call from an employee, notifying him that the company had shut down and it was their last day in business. Clemenza rushed down to the plant and observed that Respondent was handing out the last pay checks to employees. Clemenza spoke to James Beneroff, Respondent's president, who confirmed to Clemenza that Respondent was closing down and going out of business. Clemenza informed Beneroff that Respondent owed monies to the Union's welfare and pension funds and union dues. Beneroff conceded that he was aware that money was due and promised to pay the amounts due.

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The Union's attorney, Michael Scaraggi, sent out a letter to Respondent, dated March 27, which was also hand-delivered by Clemenza to Beneroff, reflecting that Respondent was delinquent in welfare and pension contributions and union dues for various dates between December 2012 and March 2013. The letter requests that the monies be paid within seven days of the letter.

Clemenza made several visits to Respondent's facility in April to attempt to collect these delinquencies from Respondent during early April. He received from Beneroff the payments for the union dues but nothing else covering pension or welfare payments or for severance and vacation benefits, which had also become due as a result of the shutdown and the layoff of employees.

On April 7, the Union filed a grievance for all employees, alleging failure to pay contractual vacation pay, severance pay, pension and dues. Respondent did not file a response to this grievance.

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On April 8, an arbitration hearing was conducted before Arbitrator J.J. Pierson, pursuant to the expedited arbitration provision contained in the contract concerning payments to the Union's welfare fund. Respondent did not appear. The arbitrator, as provided in the contract, conducted the hearing in the absence of Respondent. The decision issued by Arbitrator Pierson, issued on April 14, reflected that counsel for the fund had represented that he was contacted by the employer through its counsel, requesting consent to adjourn the hearing and claiming that, while the company was in liquidation, there were substantial assets to satisfy the delinquency. According to counsel for the fund, the request was denied by the fund and the trustee. The decision by the arbitrator found that Respondent was delinquent in payments to the welfare fund for February, March and April and ordered payment to the fund in the amount of \$125,875.00, plus interest, legal fees and the cost of the arbitration.

Neither the Union nor the fund has, of the date of the instant trial, sought to enforce this award.

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On April 8, Scaraggi sent an email to John Craner, Respondent's attorney, confirming a conversation that they had on the morning of the arbitration, discussing the arbitration, in which Scaraggi stated that he would place Craner's comments in that regard on the record.²

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During this conversation between Scaraggi and Craner, Scaraggi also informed Craner that a grievance had been filed regarding severance pay, vacation pay and pension, which was still unresolved and that the grievances had been sent to Beneroff. Scaraggi's email is as follows:

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From: Michael T. Scaraggi michaelscaraggi@netscape.net

To: john.craner <john.craner@css-pc.com>
Cc: JGiovinco <JGiovinco@Local298.com>

Date: Mon, Apr 8, 2013 2:27pm

Mr. Craner:

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I am in receipt of your emails, however, I have informed you that I would proceed with the arbitration which was scheduled this morning at 10:00AM. I placed your comments on the record with arbitrator J.J. Pierson and proceeded to arbitrate the welfare delinquency to conclusion. I expect an Award from Mr. Pierson shortly and will share same with you.

² As noted above, the arbitrator's decision reflected Craner's comments concerning adjourning the hearing since Respondent had sufficient assets to pay the amounts due.

Today I was informed that issues regarding the delinquency of severance pay, vacation and pension remain unresolved and upon notification to Mr. Beneroff[.] I was informed you were to be contacted. Pursuant to the CBA a Grievance was filed and an Answer is required within 5 days. In the event the matter is not resolved, I will contact the New Jersey State Board of Mediation to address those open matters. In the interim I am providing the names of 2 arbitrators who would be acceptable to the Union: J.J. Pierson and Gerard Restaino[.]

If these arbitrators or either one are acceptable I will proceed in that manner.

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Fax: 973-364-0211

E-mail: michaelscaragqi@netscape.net

Respondent did not file an answer to the grievance (as the contract requires Respondent to do within five days) nor did Craner respond to Scaraggi's email concerning arbitrators, who might be acceptable to Respondent.

The Union never filed for arbitration of this grievance. In this proceeding, Scaraggi testified and stated that the Union did not file for arbitration and instead chose to file charges with the Board because the Union "thought that the Board would be faster in ruling on these issues."

Respondent's answer in this proceeding admitted the factual allegations in the complaint but denied that Respondent had violated the Act and raised affirmative defenses. These defenses are as follows:

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FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim under 29 *US.C.* § 158(a)(1) and (5) upon which relief can be granted.

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SECOND AFFIRMATIVE DEFENSE

The Union has failed to exhaust its remedies pursuant to the arbitration provisions of the collective bargaining agreement and General Counsel has failed to defer this matter to that arbitration procedure in accordance with established precedence concerning deferral of contractual disputes to arbitration.

THIRD AFFIRMATIVE DEFENSE

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Respondent has gone out of business due to financial reasons. The Pension Fund, which has already obtained an arbitration award against Respondent for the pension arrears the Union seeks, is expected to file a proof of claim in the bankruptcy proceeding. Similarly, employees who claim entitlement to severance pay and/or vacation pay can file proofs of claim in the bankruptcy proceeding. If General Counsel were to prevail in this matter, the remedy stated herein would be the remedy that affected employees and the Pension Fund would have to be followed in any event. As for the proposed remedy sought by

General Counsel that Respondent be required to submit appropriate documentation to the Social Security Administration, since no back pay is owed or sought in this proceeding, that proposed remedy is moot.

During opening statements given at the trial, General Counsel addressed Respondent's affirmative defense that the Union failed to exhaust administrative remedies. General Counsel stated that the Union had emailed and faxed a grievance to Respondent, to which it did not respond and has since refused to waive timeliness as a defense.

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Respondent's attorney, John Craner, made his opening statement, wherein he reiterated Respondent's defense that the Union failed to exhaust its contractual remedies, contending that though the Union filed a grievance, it never followed through and pursued the grievance to arbitration. In response to General Counsel's assertion that Respondent refused to waive the time limits, Craner stated this comment was untrue since he had a conversation with General Counsel, wherein he was asked if Respondent would waive the time limits so that the matter could be pursued to arbitration. According to Craner, he informed General Counsel that Respondent would waive any time limits but that pursing it to arbitration would be of no value because of the bankruptcy and that the Union could just as easily file a proof of claim instead of going to arbitration. Thus, Craner contended that "we dispute the fact that the Company refused to waive the time limits to pursue the grievances."

In response to this assertion, General Counsel disputed Craner's account of their conversation. According to General Counsel, Craner advised him that the Respondent would not waive timeliness, but that if the Union withdraws that charge and the Region dismisses the complaint, then, at that point, Respondent would be willing to waive timeliness.

After some further discussion, I stated that as a result of conflicting versions of Craner's conversation with General Counsel, as detailed above, "that there may be a question of fact, whether Respondent agreed to waive the time limits or not." Craner again insisted that Respondent contends that it did waive the time limits. I reminded him that he may need to testify to his version of the conversation. Craner responded that so will Counsel for the General Counsel. However, neither Craner nor General Counsel testified about their conversation so that the statements made about their conversation, detailed above, is derived from comments made in their opening statements and responses and were not provided under oath as testimony subject to cross-examination.

Subsequent to the shutdown, as related above, Respondent filed for bankruptcy in federal court. Neither the Union nor the fund nor General Counsel had filed any claims in the bankruptcy proceeding based on the matters included in the instant complaint.

III. Analysis and Conclusions

The facts are undisputed that Respondent is a party to a collective bargaining agreement with the Union, providing for the payment by Respondent to the Union's pension fund on behalf of its employees as well as for the payment of severance and accrued vacation pay to employees in the event of layoff or shutdown. It is also undisputed that Respondent failed to comply with its contractual obligations by failing to make pension contributions for the months of December 2012 and January through March of 2013 for its employees and by failing to make severance and accrued vacation pay to its employees after it shutdown operations on April 1. Indeed, Respondent not only admits these facts in its answer, at trial and in its brief but asserts that this conduct does not amount to an unfair labor practice, but is merely a breach of contract, absent any evidence of anti-union animus, and cannot be found to be an unfair labor practice.

Respondent's position and contentions are clearly wrong and contrary to longstanding Board precedent, supported by the courts, including the Supreme Court. Republic Die & Tool Co., 343 NLRB 683, 686 (2004) (modification of wage and benefit provisions of contract, including vacation and severance payment without the union's consent, violative of the Act); Victory Specialty Packaging, 331 NLRB No. 139 (2000), not reported in bound volumes (failure to make contractual payments for severance pay, vacation pay and health insurance constituted repudiation of collective bargaining agreement and violative of Act); Zimmerman Painting & Decorating, 302 NLRB 856, 857 (1991) (Board rejects, once again, affirmative defense that failure to adhere to contract is only breach of contract and not an unfair labor practice; violation failure to make timely payments to benefit funds); Wightman Center, 301 NLRB 573, 575 (1991) (increase in wages during contract term, without consent of union, unlawful, notwithstanding evidence of economic necessity and no evidence anti-union animus); Rapid Fur Dressing, 278 NLRB 905 (1986) (mid-term modification of required vacation and pension payments, violative of Act: reiterates in answer to dissent of chairman that although not every contract violation constituted an unfair labor practice, these modifications of contract are unlawful); Garland Distributing Co., 234 NLRB 1275, 1280 (1978) (failure to honor work preservation clause in contract by assigning work to non-unit employees, violative of Act; decision of judge affirmed by Board, states as follows:

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The fact that Respondent's conduct also constitutes a breach of contract does not, of course, oust the Board from jurisdiction over the subject matter of this proceeding. The law is well settled that where conduct is of a kind condemned by the Act, it is not ruled out as an unfair labor practice because it happens also to be a breach of contract. *C & S Industries*, 158 NLRB 454, 458 (1966), at 458. The Supreme Court has made it clear that the availability of a contract remedy does not divest the Board of its jurisdiction to remedy unfair labor practices.

N.L.R.B. v. Strong d/b/a Strong Roofing & Insulating Co., 393 U.S. 357 (1969).);

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St. Louis Gateway Hotel Co., 286 NLRB 863, 865-866 (1987) (failure to pay contractually required vacation and pension payments, violative of Act); New Mexico Symphony Orchestra, 335 NLRB 896, 898 (2001) (failure to make timely wage payments, violative of Act; Board rejects defense that case involved "unintended and unavoidable breach" of contract due to lack of sufficient funds to cover expenses); Capitol City Lumber v. NLRB, 721 F.2d 546, 548-549 (6th Cir. 1983) (Circuit Court affirms Board view that Board can remedy contract violations, where disputes are contractual to disposition of unfair labor practice complaint; violation of reductions in payments to pension and welfare funds held to be within Board's jurisdiction because contractual violation is identical to unfair labor practice); Oak Cliff-Golman Baking, 207 NLRB 1063, 1064 (1973) (Board rejects assertion that reduction of wages was at most a breach of contract with the union of a kind that should be remedied by other processes and ultimately by

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the courts).

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Respondent has cited no Board cases supporting its position or contradicting the well-settled Board and court precedent detailed above.³

However, Respondent does cite a District Court opinion in NECA v. IBEW Pension Trust

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³ Board decisions have, at times, contained dissenting opinions by various Board members, supporting Respondent's view that the Board should not be in the business of enforcing contracts and/or that the parties have other avenues to enforce the agreements. See dissents in *Rapid Fur Dressing*, 278 NLRB 905, 907-908 (1986); *Endicott Forging Mfg. Inc.*, 328 NLRB 69, 75 (1999); *Zimmerman Painting*, supra, 302 NLRB at 859. These dissents have not received majority support from any subsequent Board panels.

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Fund v. Bays Company LLC, 2010 WL 1416879, 188 LRRM 259 (CD. ILL, 2010). Respondent cited the following quotation from the opinion:

Unfair labor practices include, *inter alia*, preventing an employee from participating in labor organization or forming a labor organization, refusing to bargain collectively with an employee's representative, and agreeing to boycott another employer. 29 U.S.C. §158. Because failing to remit funds does not constitute an unfair labor practice as described in 29 U.S.C. §158, an action to enforce an agreement to remit funds if not subject to the six month statute of limitations.

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Respondent relies on the statement made by the judge that the failure to remit funds does not constitute an unfair labor practice. However, a close examination of the entire opinion of the judge, as well as his later opinion on the merits of the dispute before him, clarify his earlier ruling, where he made that statement, makes it clear that this case is not an authority for concluding that the failure to make contractual payment is not an unfair labor practice under the Act.

The judge's initial opinion ruled on a motion for summary judgment to dismiss filed by the defendant based on the NLRA's six-month statute of limitations. The judge dismissed the defendant's motion to dismiss based on the NLRA's six-month statute of limitations since the action therein was not a unfair labor practice claim but an ERISA action filed against alleged successor and/or alter ego employers for unpaid funds payments. It was in that context, and based on those facts, that the judge denied the defendant's motion to dismiss, wherein he made the ill-advised and inaccurate comment, described above, that failing to remit funds to the pension and welfare funds does not constitute an unfair labor practice under the NLRA. That statement by the judge is clearly incorrect as demonstrated by the Board and court precedent cited above.

Indeed, the judge clarified his opinion in his subsequent decision on the merits of the ERISA dispute before him, which he issued on September 19, 2012. In that opinion (894 F.Supp.2d 1071, CD III, 2012), he summarized the procedural history of the case, including its prior ruling on the summary judgment motion, detailed above. He noted that the defendant had filed a motion to clarify that opinion and plaintiff made a response to the motion to clarify. The judge noted that on April 30, 2010, he entered an order denying defendant's request and referred to plaintiff's response, as follows:

If this Opinion was not adequately clear, Plaintiffs thoroughly explained why the six-month statute of limitations applicable to an unfair labor practice or duty of fair representation claim under the National Labor Relations Act does not apply to Plaintiff's claim, which is a delinquent contribution collection action based on a written contract and brought pursuant to ERISA, 29 U.S.C. §1145. This court thoroughly agrees with Plaintiffs' clear explanation of this court's ruling. Id at 4.

Accordingly, based upon the foregoing, I reject Respondent's defense that no violation of the Act can be found because the dispute is essentially a contract enforcement issue that must and can be resolved by other avenues.

In this regard, Respondent also asserts that since Respondent is in bankruptcy, claims must be filed with the bankruptcy court by employees for severance and vacation benefits and by the pension fund for unpaid contributions. However, the Board has consistently rejected the assertion that the filing of a bankruptcy petition precludes the Board from finding an unfair labor

practice based on pre-or post-petition conduct or that the parties are relegated to the filing of claims rather than pursing unfair labor practice charges. *Daniel I. Burk Enterprises*, 313 NLRB 1263, fn. 1 (1994) (institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process unfair labor case to its final disposition, including ordering payment of backpay or other monetary relief); *R.T. Jones Lumber Co.*, 313 NLRB 726, 727-728 (1994) (Board states that it has authority to process unfair labor practices, including determination of such monetary wages as may be owed as a result of the unfair labor practices, although the subsequent collection of monies owed requires a separation application to the bankruptcy court). Accord, *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832-835 (9th Cir. 1991); *NLRB v. P.I.E. Nationwide Inc.*, 923 F.2d 506, 512 (7th Cir. 1991).

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Respondent also asserts in its answer and at trial that this matter should be deferred to arbitration under the principles of *Collyer Insulated Wire*, 192 NLRB 837 (1971). I disagree.

It is well-settled that deferral to arbitration under *Collyer* principles is inappropriate, where, as here, Respondent's admitted breach of the collective bargaining agreement does not involve a problem of contract interpretation or require the special competence of an arbitrator. *R.T. Jones*, supra, 313 NLRB at 727; *New Mexico Symphony Orchestra*, 335 NLRB 896-897 (2001); *Grane Health Care*, 337 NLRB 432, 436 (2002); *American Commercial Lines*, 296
NLRB 622, 623, fn. 8 (1989); *Struthers Wells Care*, 245 NLRB 1170, 1171, fn. 4 (1979), enfd. 636 F.2d 1210 (3rd Cir. 1980); *Oak Cliff-Golman*, 207 NLRB 1063 (1973); *O. Voorhees Painting*, 275 NLRB 779, 785-786 (1985).

Here, there is no dispute as to the meaning of contractual terms, no assertion by Respondent that the contract privileges Respondent's conduct and no basis or need to utilize an arbitrator to resolve the parties' dispute. Indeed, the Board observed in its *Collyer* decision that the case was "eminently well suited to resolution by arbitration," because "the contract and its meaning" were at the center of the dispute. 192 NLRB at 842. Language relied upon in *American Commercial Lines*, supra, 296 NLRB at 632 and *O. Voorhees Painting*, supra, 275 NLRB at 785.

Indeed, here, as noted above, Respondent has admitted that it has violated the terms of the contract in effect between the parties and defends its conduct on the grounds that it does not violate the Act and that the Union and the employees must pursue their claims through other avenues.

Accordingly, based on the above analysis and precedent, I reject Respondent's deferral defenses.

Having made that conclusion, which is amply supported by Board precedent, as set forth above, I need not and do not make any findings concerning several other contentions made by General Counsel as to why deferral under *Collyer* is inappropriate. These arguments include General Counsel's contentions that Respondent has failed to expressly waive the contractual time limits, *Hallmor Inc.*, 327 NLRB 292, 293 (1998) and/or that Respondent ignored the Union's request to respond to the grievance filed by the Union and to name arbitrators, *Gateway Hotel Corp.*, 286 NLRB 863 (1987); *Daniel I. Burk Enterprises*, supra, 313 NLRB at 1263.

With respect to the waiver of the time limits issue, I note that, here, the record contains two conflicting versions of a conversation between Respondent's attorney and General Counsel, wherein Respondent may or may not have agreed to waive the time limits in the contract. I also note that these versions of the conversation were provided during opening statements and that neither attorney testified under oath, subject to cross-examination, concerning this conversation.

I, therefore, do not make any findings as to which version of the conversation is accurate or, indeed, any creditability resolution as to what was said in that conversation.

Respondent at the trial stated by its attorney that Respondent was willing to waive the contractual time limits. If so, it is questionable whether this is considered too late to warrant deferral. I note that in *O. Voorhees Painting*, a judge concluded that an offer by respondent for the first time at the hearing to waive the timeliness objection to the grievance was not sufficient to justify deferral because it was made for the first time at the hearing. The Board, in adopting the judge's finding that deferral was not appropriate, found it unnecessary to rely on the judge's statement that the offer to waive timeliness objection was not sufficient because it was made for the first time at the hearing. Rather, the Board concluded that even assuming that the respondent's offer was sufficient to waive the timeliness objection, that "we agree with the judge that the nature of the dispute is not well suited for deferral," fn.2, 275 NLRB at 779.

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The judge's findings that the dispute was not well suited for deferral was based on the well-settled principles that I have detailed above that none of the issues raised involved the interpretations over any terms or meaning of the contract. He noted that the allegations of refusal to pay wages, overtime and fringe benefits do not require any interpretation of any contract terms or meaning, and respondent has not asserted any claim of contractual privileges to pay less wages and overtime. He concluded that "this is not a case which pivots on a question of contract construction," Id at 786.

Therefore, since I have also relied on that analysis, supported by numerous subsequent cases cited above,⁴ to find deferral inappropriate, I find it unnecessary to decide whether the other grounds asserted by General Counsel are also sufficient to reject Respondent's deferral defenses.

Respondent has, based upon the foregoing analysis and precedent, violated Section 8(a)(1) and (5) of the Act by failing to pay the contractually required pension benefits to the pension fund and the severance and accrued vacation benefits to employees without the consent of the Union. I so find.

Conclusions of Law

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- 1. The Respondent, Squire Corrugated Box Company, South Plainfield, New Jersey, is an employer within the meaning of Section 2(2),(6) and (7) of the Act.
- 2. Production Workers Union, Local 148, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
 - 3. At all times material, herein, the Union has been the exclusive representative of the employees in the following appropriate unit for collective bargaining:

All production and maintenance employees and truck drivers, excluding clerical and office employees, guards and professional employees and supervisors as defined by the Act.

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⁴ R.T. Jones, supra; New Mexico Symphony, supra; Grane Health Care, supra; American Commercial Lines, supra; Struthers Wells, supra.

4. By failing to make contractually required payments to the Union's pension fund and payments to employees for severance and accrued vacation pay, Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

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Remedy

Having found that Respondent had violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act by failing (1) to make contributions to the Union's pension fund, (2) to pay employees severance pay and (3) to pay employees accrued vacation pay as required in the collective bargaining agreement, the Respondent shall be ordered to make the pension contributions that it unlawfully withheld and to make whole the employees for their losses suffered by reason of Respondent's failure to pay them contractually required severance and accrued vacation benefits.

The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In addition, in accordance with the Board's decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), I shall order the Respondent compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each employee.

With respect to the latter requirements, Respondent objects, contending in its answer that such remedies are inappropriate since no backpay is owed or sought, so no Social Security documents need be updated or changed. However, the Board in *Latino Express*, supra made it clear that these new remedies with respect to filing reports with the Social Security Administration, allocating backpay to the appropriate calendar quarters and to compensate employees for any adverse tax consequences of receiving lump-sum payments covering periods longer than 1 year, apply to 8(a)(5) violations based on unilateral changes, such as in this case as well as to 8(a)(3) discrimination cases, 359 NLRB #44, fn. 1 at p. 1; *Alamo Rent-A-Car*, 359 NLRB #149, slip op p. 3 (2013), applying *Latino Express* remedy to unilateral elimination of short term disability benefits; *Walt Disney World*, 359 NLRB #73, slip op at 7 (2013) (applying *Latino Express* remedy to employer's unlawful conduct of elimination of two classifications from the unit and failing to apply contract to these classifications).

On these findings of fact and conclusions of law and based on the entire record, I issue the following recommended.⁵

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⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

ORDER

The Respondent, Squire Corrugated Box Company, South Plainfield, New Jersey, its officers, agents, successors and assigns, shall

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1. Cease and desist from

(a) Refusing to bargain collectively with the Union as the exclusive collective bargaining representative of the employees in the following unit, by failing and refusing to make pension contributions to the Union's pension fund and by failing to pay to its employees severance pay and accrued vacation, required under its collective bargaining agreement with the Union

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All production and maintenance employees and truck drivers, excluding clerical and office employees, guards and professional employees and supervisors as defined by the Act.

(b) In any like to related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

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(a) Make the pension payments, which have been unlawfully withheld to the Union's pension fund, and make whole unit employees for the failure to pay them contractually required severance and accrued vacation benefits, with interest as set forth in the remedy section of this decision.

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(b) Compensate the unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(d) Within 14 days after service by the Region, post at its South Plainfield, New Jersey facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2012. 5 (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. Dated, Washington, D.C. January 13, 2014 10 Steven Fish, Administrative Law Judge 15 20 25 30 35 40 45

defaced, or covered by any other material. If the Respondent has gone out of business or

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective bargaining representative of our unit employees in the following collective bargaining unit, by failing and refusing to make pension contributions to the Union's pension fund or by failing to pay to our employees severance pay or vacation pay required under our collective bargaining agreement with the Union.

All production and maintenance employees and truck drivers, excluding clerical and office employees, guards and professional employees and supervisors as defined by the Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL make the pension fund contributions, which have been unilaterally withheld pursuant to the collective bargaining agreement between us and the Union and make our employees whole for any losses suffered by them as a result of our failure to provide them contractually required severance and accrued vacation payments.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

		Squire Corrugated Box Company		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor Newark, New Jersey 07102-3110 Hours: 8:30 a.m. to 5 p.m. 973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.